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Supreme Court of the United States

No. [redacted]185

October Term, 1967

JOHN P. COYNE, Administrator of the Estate of Donald William Powell, Sr., deceased,
Petitioner,

vs.

JOHN MOHR & SONS, INC., a corporation,
Respondent,

vs.

UNITED STATES STEEL CORPORATION.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INDEX.

	PAGE
Questions Presented	1
Statement of the Case	2
Argument	5
1. The Court of Appeals clearly recognized the succinct language and unmistaken meaning of the contract involved by holding that, upon the basis of the entire record, the Respondent owed no duty to the decedent	5
2. There is absolutely no conflict between the United States Court of Appeals for the Seventh Circuit and the United States Court of Appeals for the Third Circuit	6
3. If, for purposes of argument, we assume that a conflict is found to exist between the decision of the United States Court of Appeals for the Seventh Circuit and the decision of the United States Court of Appeals for the Third Circuit, such a conflict is of no consequence to this Court since the cases involve the application of State law and involve no issue of federal law	7
Conclusion	9

Cases Cited.

Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U. S. 525, 78 S. Ct. 893, 2 L. Ed. 2d 953 (1958)	9
Dilks v. Flohr Chevrolet, Inc., 411 Pa. 425, 192 A. 2d 682 (1963)	6
Employers Liability Assurance Corporation v. Greenville Business Men's Association, 423 Pa. 292, 224 A. 2d 620 (1966)	6
Farmers State Bank of Valparaiso v. Dravo Corp., 321 F. 2d 38 (7th Cir. 1963)	6, 7
Huddleston v. Dwyer, 322 U. S. 232, 64 S. Ct. 1018, 88 L. Ed. 1246 (1944)	8
Perry v. Payne, 217 Pa. 252, 66 Atl. 553 (1907)	6

PAGE

Richards v. United States, 369 U. S. 1, 82 S. Ct. 585, 7 L. Ed. 2d 492 (1962) 9
Ruhlin v. New York Life Insurance Company, 304 U. S. 202, 58 S. Ct. 860, 82 L. Ed. 1188 (1938) 8
Wolf v. Weinstein, 372 U. S. 633, 83 S. Ct 969, 10 L. Ed. 2d 33 (1963) 8

IN THE

Supreme Court of the United States

No. 1416
October Term, 1967

JOHN P. COYNE, Administrator of the Estate of Donald William Powell, Sr., deceased,
Petitioner,

vs.

JOHN MOHR & SONS, INC., a corporation,
Respondent,

vs.

UNITED STATES STEEL CORPORATION.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Questions Presented

1. Whether the Court of Appeals erred as a matter of law in holding that a contractual provision requiring Respondent to "furnish, install and later remove all temporary roads used during construction" imposed upon Respondent such obligation only in regard to "roadways required in connection with construction assigned to [Respondent]".

2. Whether the Court of Appeals erred as a matter of law in holding that a contractual provision requiring Respondent to provide for the safety of "any other person who enters upon Owner's [United States Steel Corpora-

tion] premises for reasons relating to this contract [between Respondent and United States Steel Corporation]" merely imposed upon Respondent the duty "to provide for the safety of all persons who are on the premises to engage in activity assigned to [Respondent]".

3. Whether the Court of Appeals was correct in determining that the decedent was engaged in work assigned to United States Steel Corporation and that there was no basis in the record to support a jury's finding to the contrary.

Statement of the Case

This is an action for the wrongful death of the Petitioner's decedent brought against John Mohr & Sons, Inc. (Respondent), jurisdictionally based upon the diversity of citizenship of the parties involved and the amount in controversy. The Petitioner's decedent was employed by the United States Steel Corporation (Steel) at the time of his death. Steel was joined as a third-party defendant but is not a party to this proceeding.

Steel decided to erect a blast furnace and entered into a contract with Respondent dated September 20, 1960. Respondent was to be the prime contractor for the erection of not only the furnace but also many of the auxiliaries including a slag pit which was to be equipped with a water system for spraying and cooling molten slag as it emerged from the furnace. Steel negotiated with another company to put in foundations and reserved to itself (its Bridge Division) the construction of a "bag filterhouse" the purpose of which was to remove dust from ore.

The construction of the filterhouse required the use of a large "3900" crane with a 120 foot boom. To prevent the crane from being mired in the slag pit, Steel constructed

a ramp from 2½ ton wooden mats laid in place with a smaller "3500" crane having an 80 foot boom. This boom at its highest point could not come closer to the high tension wires 104 feet off the ground than the minimum safety distance (17 feet).

The Respondent requested that certain of these mats be removed to enable the Respondent to work on the water system. These were removed with the smaller "3500" crane. After Respondent finished its work, Steel began to move the mats back in place under the direction of its own engineer. However, instead of using the "3500" crane, Steel used its "3900" crane with its boom fully extended to 120 feet, although it could have been shortened had Steel so desired. As Petitioner's decedent, an employee of Steel, was disconnecting the hook on the crane cable from a ring on the side of one of the wooden mats, electrical current jumped the eleven foot gap between the high tension wires and boom, running down the cable and electrocuting Petitioner's decedent. It is agreed that, at the time the mats were being restored to place, the Respondent had no authority or control over the work being done. This was recognized by both of the courts below. (See pp. 21 and 26n.2 of the Petition.) The Respondent had requested Steel to remove the mats in the first instance because they were obstructing the Respondent in the performance of its obligations under the contract.

In view of the fact that the litigants recognize that the Respondent owed Petitioner's decedent no duty to warn of danger or otherwise provide for his safety except as might be required by the contract between Steel and the Respondent, the case in both the District Court and the Court of Appeals turned upon a construction and interpretation of the contract. The principal applicable section of the contract § 16 which provides as follows:

"16. The safety of all persons employed by Contractor and his sub-contractors on Owner's premises, or any other person who enters upon Owner's premises for reasons relating to this contract, shall be the sole responsibility of Contractor. Contractor shall at all times maintain good order among his employees and shall not employ on the work any unfit person or anyone not skilled in the work assigned to him. Contractor shall confine his employees and all other persons who come onto Owner's premises at Contractor's request or for reasons relating to this contract and his equipment to that portion of Owner's premises where the work under this contract is to be performed or to roads leading to and from such work sites, and to any other area which Owner may permit Contractor to use.

"Contractor shall take all reasonable measures and precautions at all times to prevent injuries to or the death of any of his employees or any other person who enters upon Owner's premises. Such measures and precautions shall include, but shall not be limited to, all safeguards and warnings necessary to protect workmen and others against any conditions on Owner's premises which could be dangerous and to prevent accidents of any kind whenever work is being performed in proximity to any moving or operating machinery, equipment or facilities whether such machinery, equipment or facilities are the property of or are being operated by, the Contractor, his subcontractors, the Owner or other persons.

"It is understood that if employees of Owner shall perform any acts for the purpose of discharging the responsibility undertaken by the Contractor in this Article 16, whether requested to perform such acts by the Contractor or not, such employees of the Owner while performing such acts shall be considered the agents and servants of the Contractor subject to the exclusive control of the Contractor."

These three paragraphs essentially provide:

1. Respondent has the sole responsibility for the safety of all persons on the premises involved "for reasons relating to this contract."

2. Respondent is to take precautions to prevent the death of its employees or any other person entering upon Steel's premises.

3. If any of Steel's employees for any reason perform safety responsibilities which should be done by the Respondent, Steel's employees are to be considered the agents, servants and employees of Respondent while performing that function.

Pertinent portions of § 26 are set out at page 4 of the Petition and will not be repeated here. This section concerns itself with roadways required in connection with the Respondent's performance of its responsibilities under the contract.

The jury returned a verdict in favor of the Petitioner and against the Respondent in the sum of $95,000.00. The Respondent, in turn, received a limited award for contribution against Steel whose negligence was described by the trial court as "glaring." (See p. 22 of the Petition.) An appeal was taken by the Respondent to the United States Court of Appeals for the Third Circuit which reversed the judgment of the District Court with instructions to the District Court to enter judgment for the Respondent. The Petition for a Writ of Certiorari followed.

ARGUMENT

1. The Court of Appeals clearly recognized the succinct language and unmistaken meaning of the contract involved by holding that, upon the basis of the entire record, the Respondent owed no duty to the decedent.

The opinion of the District Court and the Court of Appeals are in complete accord on one basic legal proposition. This is that where, as here, there is no ambiguity of any

kind or nature in the contract, its interpretation is one for the court alone. The opinion of the Court of Appeals, in addition to accepting the Respondent's basic thesis, also clearly adhered to the position long held by the courts that one party will not be held responsible for the negligence of another party as a matter of Pennsylvania contract law unless that contract clearly and in no uncertain terms indicates that this is precisely what the parties agreed to. *Cf. Employers Liability Assurance Corporation v. Greenville Business Men's Association*, 423 Pa. 292, 224 A. 2d 620 (1966); *Dilks v. Flohr Chevrolet, Inc.*, 411 Pa. 425, 192 A. 2d 682 (1963); and *Perry v. Payne*, 217 Pa. 252, 66 Atl. 553 (1907). The way this proposition was stated by the Court below was:

> "Nowhere in the contract is it declared that [Respondent] is responsible for the safety of Steel's or any other company's employees who may be injured as a result of activity other than that assigned to [Respondent]." (See page 28 of the Petition.)

The Petitioner concedes that no duty exists outside of that imposed by the contract between Steel and the Respondent. The plain and clear language of the contract as set forth and ably discussed by the Court of Appeals inescapably leads to the conclusion reached by the Court of Appeals and limits the Respondent's liability to activity concerned with the performance of the work assigned to it as a part of its contractual obligation with Steel.

2. There is absolutely no conflict between the United States Court of Appeals for the Seventh Circuit and the United States Court of Appeals for the Third Circuit.

The Petitioner basically rests his Petition upon an alleged conflict in the Circuits. The conflict is of the Petitioner's own creation and does not exist. On page 8 of his Petition, he quotes *partially* from *Farmers State Bank*

of Valparaiso v. Dravo Corp., 321 F. 2d 38, 41 (7th Cir. 1963), to the effect that the United States Court of Appeals for the Seventh Circuit stated that recovery would be allowed to those persons "whose presence is incidental to or attributable to the performance of the work contracted to be done or furnished by [the contractor] * * *". The part of the quotation omitted is: "but not to an employee of U. S. Steel engaged in the performance of the work it reserved to itself." The Courts of Appeals for both the Seventh and Third Circuits have clearly pointed out that the plaintiff's decedent (in each case) was in the employ of Steel and engaged in the performance of work reserved to Steel under the contract. Petitioner's statement, therefore, that it is "in full accord with the analysis and views of the Court of Appeals for the Seventh Circuit" (see page 8 of the Petition) constitutes an admission that must result in the clear and unmistakable conclusion that there is no conflict between the decisions of the United States Court of Appeals for the Seventh Circuit and the decision of the United States Court of Appeals for the Third Circuit, and, therefore, that there is no real basis for the issuance of a writ of certiorari by this Court.

3. If, for purposes of argument, we assume that a conflict is found to exist between the decision of the United States Court of Appeals for the Seventh Circuit and the decision of the United States Court of Appeals for the Third Circuit, such a conflict is of no consequence to this Court since the cases involve the application of State law and involve no issue of federal law.

In *Farmers State Bank of Valparaiso vs. Dravo Corp., supra,* the Court was concerned with the interpretation of a local Indiana Statute as well as with what appeared to be an Indiana contract. The worker there, an employee of

Steel, was killed at the Gary Works. No suggestion was made that any federal issue or policy of substance was involved. The same is true in this case. An examination of the briefs and records in the courts below indicates that the parties were in agreement that the matter was one simply involving Pennsylvania law and its application to the contract. In such instances this Court has held that it will not issue writs of certiorari to review determinations made by the various Courts of Appeals. *Wolf v. Weinstein*, 372 U. S. 633, 636, 83 S. Ct. 969, 10 L. Ed. 2d 33, 39 (1963). A conflict in the decisions of the various Circuits is not of itself a reason for granting a writ of certiorari as to the questions controlled by state law, since the alleged conflict may only represent a permissible difference of opinion among the several states as to what the law is. Only where the lower federal courts have failed to follow state law as it exists, or as it in all probability will be if not as yet announced by the state appellate courts themselves, will the Supreme Court issue writs of certiorari. *Ruhlin v. New York Life Insurance Company*, 304 U. S. 202, 58 S. Ct. 860, 82 L. Ed. 1188 (1938). See *Huddleston v. Dwyer*, 322 U. S. 232, 64 S. Ct. 1018, 88 L. Ed. 1246 (1944). It is clear that the Court of Appeals did not feel bound in any way by the decision of the United States Court of Appeals for the Seventh Circuit but simply referred to it as the only other comparable or analogous case available to it, as a case helpful to it in its own analysis, and as one which also appeared to support the conclusion that it was reaching itself independently. All that the Court of Appeals is really saying in this regard is that it feels that Pennsylvania appellate courts will reach the same conclusion that the United States Court of Appeals for the Seventh Circuit felt the Indiana appellate courts would reach; that and nothing more.

The Supreme Court ordinarily accepts the interpretation of the local law by the Court of Appeals and particularly does so where neither party disputes the interpretation of the local law. *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U. S. 525, 529-530, 78 S. Ct. 893, 2 L. Ed. 2d 953, 958 (1958); *Richards v. United States*, 369 U. S. 1, 16n.35, 82 S. Ct. 585, 7 L. Ed. 2d 492, 502n.35 (1962). It is important to note that all of the parties here agree on the contract and agree on what the Pennsylvania law is as to how such contracts are to be interpreted. The only dispute is as to how the undisputed Pennsylvania law was applied to the contract by the Court below. It is accordingly submitted that this case is not one in which this Court should issue a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit.

Conclusion

For the reasons stated, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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